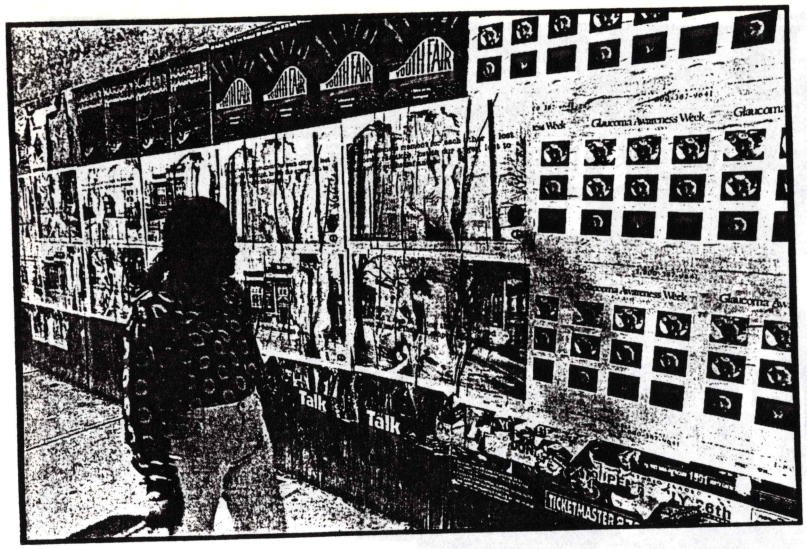
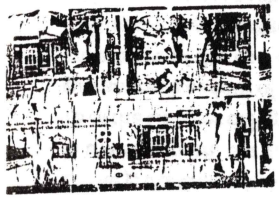
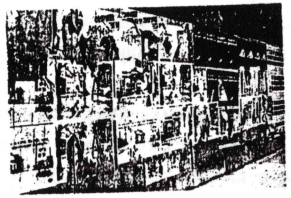


STERS BY MARTHA JUDGE

e photographs on the following pages were produced as posters by Martha Judge for the *calmotive* show, a public art exhibit which encompassed various points and sites in the Junction area Toronto in the spring of 1992. Martha's posters were glued and stapled to hoardings in the area; edia attention focussed on the almost immediate ripping down—the vandalizing—of these posters.





KEEPING OUR SEX "SAFE"

ANTI-CENSORSHIP STRATEGIES VS. THE POLITICS OF PROTECTION

THELMA MCCORMACK

Are women protected by state censorship? And if we need the protection, is censorship the most expeditious way of providing it? Or does state-supported censorship further our dependency on a patriarchal state and disempower us? I am going to explore the connection between state-sponsored censorship enforced by the criminal justice system and artistic freedom; and, in addition, the connection between state censorship and the feminist notion of empowerment.

Squarely in this terrain sits the question of the connection between pornography and equality, and whether state-sponsored censorship furthers the equality interests of women. I am going to argue that censorship discriminates against cultural workers and contributes to the dependency of women. But I also want to challenge the idea that the imagery of women in pornography, which the Court describes as dehumanizing and degrading, is related to equality. On the contrary, I am going to suggest that the principal enemy of women's equality is our mainstream culture with its images of women as family-centred.

FEMINISM, ART AND THE PATRIARCHAL STATE

Objections made to censorship by people in the arts can be distinguished from those made by feminists. They overlap, but are not identical. Whether we like it or not, creative artists can live with patriarchy, but they expect the same working conditions as any other intellectual or professional group in our society. No professional in my field, for example, would tolerate the interference by the state that censorship represents to artists. Feminists, however, do not constitute an occupational group, and censorship does not disrupt their careers as feminists. Their gaze is on patriarchy, so that they bring to the censorship debate a different set of criteria.

For people whose careers and livelihoods are in the arts, protection has, throughout most of history, meant patronage. With the rise of bourgeois democracy, artists have fought hard to acquire their autonomy from patrons and commissars. For better or worse, they take their chances on a combination of the market, corporate sponsors and arts grants. In Canada, artists have had to maintain constant vigilance to protect an "arms-length relationship" with their public funding sources. State censorship destroys that policy. To artists, then, state censorship is a form of discrimination. They lose the right which their colleagues in other professions take for granted.

For women who may or may not be writers, artists and film makers the protection of censorship is suffocating. It leads, on the one hand, to treating adults as irresponsible children; on the other, to an unwarranted confidence, a false illusion of security, a belief that if only we could remove certain magazines in the convenience stores, those under-the-counter videos, X-rated films and albums with their scatological lyrics, the world would be a cleaner and safer place to live in. Women would suddenly unlearn their "learned helplessness," would lose their habits of pleasing others to become fully active, self-directive and decision-making citizens.

It is a kind of innocence about human behaviour and how the world works, but it represents a way of thinking that eliminates any kind of difficult social inquiry. No need to ask why our cities are not safer, why women are harassed at work or walk in fear of being attacked. These and similar problems dissolve into a naive, single-factor determinism.

SOME BACKGROUND: FRASER, LEAF AND BUTLER

a) The Fraser Commission on Prostitution and Pornography (1985) began by looking at the proposition that pornography contributed to rape and other forms of sexual assault. There was, it said, no evidence to justify the assertion and it is not likely now or in the future that we would have a statistical method that could reliably establish this connection. But, the Commission went on to say, there *is* an historical connection between freedom of expression and equality. In the nineteenth century, the Commission said, the evolution of democracy was contingent on freedom of expression; in the twentieth, the great issue of the age is equality. Thus, if we have to choose between Section 15 of the Charter of Rights and Freedoms, the section that guarantees equality, and Section 2(b) which guarantees freedom of expression, Section 15, equality, is destined to prevail. Why? Because it is the imperative of the current moral and cultural climate.

Discounting its zeitgeist theory of history, the Commission offered an intelligent, if flawed, analysis, with an eye on the social programs of the welfare state and the aspirations of the women's movement. But the recommendations for government censorship were curiously out of sync with the tone of the rest of the report; they left open the possibility that at some future date when we had achieved a reasonable level of gender equality, we might again open the doors to freedom of expression and even "undue exploitation of sex."

b) The second relevant document is the submission to the Butler case in 1992 made by the **Legal Education and Action Fund (LEAF)**, which chose also to base its case on a "harm-based equality" argument. But LEAF went further and suggested that state censorship had *positive* value, a benign influence and could be regarded as a constructive step toward greater justice. "Prohibiting pornography," the submission said, "promotes equality."

No explanation was given by LEAF as to how or why it arrived at this conclusion, nor was there any attempt to deal with the secondary consequences of state-sponsored censorship. Neither did the LEAF brief consider artistic freedom or the more general "chill" as well as the social cost of government censorship. Instead, it stressed that pornography was different from other texts; it was an overt act of discrimination, not an ideational expression, not a work of imagination, a visual or verbal depiction of life or an entertainment. Its meaning was so clear and well understood there was no need for anyone to interpret or encode its message. An act with no ambiguity or nuance, it was specifically directed against women, not merely incongruent with women's best interests, but explicitly undermining their safety and putting them at risk.

The views of Catherine MacKinnon and Andrea Dworkin are relevant here because the LEAF factum bears the imprint of their influence and, according to the *New York Times*, Catherine MacKinnon helped to write it.[1] Pornography, MacKinnon and Dworkin say, is not an idea, an imaginary construct, or a form of speech but an overt act. They reject the distinction between thought and deed which is both the cornerstone of liberal democracy and the foundation of a humanistic model of human nature. Typically, they disregard the work of social psychologists for whom the relationship between attitudes and behaviour, between what we think and what we do, is the problematic. According to social psychologists, the relationship is not random but largely indeterminate; there is no way of specifying what the behavioral outcomes are of specific attitudes, especially when we live in a world of contradictory messages. Thus the burden of proof is on the legal experts to show that we can predict from the content of pornography what views an individual holds, or predict on the basis of social attitudes how an individual will act.

There are good reasons why this can't be done. Our distinctively human capacity is to think, select, interpret and reinterpret content, to read texts on different levels and in different ways. The result is a broad spectrum of possible attitudes which loop back to shape how we read future texts. It is also our uniquely human capacity to think the unthinkable and still make appropriate social judgements and regulate our own behaviour. Thus, when Dworkin/MacKinnon collapse the distinction between dream and deed, fantasy and act, thought and behaviour they construct a model of human nature that, in turn, justifies an elaborate system of social control, and the necessity of laws that regulate behaviour with the threat of punishment. The philosophical and political implications of the Dworkin/MacKinnon view can best be seen in the Salman Rushdie case where the Ayatollah Khomeini found Rushdie's *Satanic Verses* not a work of art, or creative imagination, but an act of blasphemy. The sooner we dissociate ourselves from that malicious doctrine, the better. What is shocking is that LEAF did not.

c) The third text is the Supreme Court decision of 1992, **the Butler decision**, which addressed a question raised by a lower court. In a case involving a large number of allegedly porn videos, the Manitoba Court held that certain of the videos it had examined met the test of obscenity in the Criminal Code of Canada, but could be protected under Section 2(b) of the Charter. Since the Charter overrides the Criminal Code, the case against these videos was dismissed. On appeal the Supreme Court ruled the material obscene on the basis that the "degrading and dehumanizing" images of women in pornography shape men's attitudes toward women and constitute a form of inequality. Historically speaking, the Butler decision was a step backward in time reasserting the importance of morality. Pornography, the judges said, was a question of morality; not morality in the abstract, but morality grounded in social practice. The spirit, if not the letter, of the Charter directs the Court to deter or prevent the formation of these attitudes and consequential social behaviour.

The historical significance of the Butler decision has more to do with the relationship of the Charter to the Criminal Code than it has to pornography and freedom of expression, but it has subsequently been regarded as a freedom-of-expression decision.

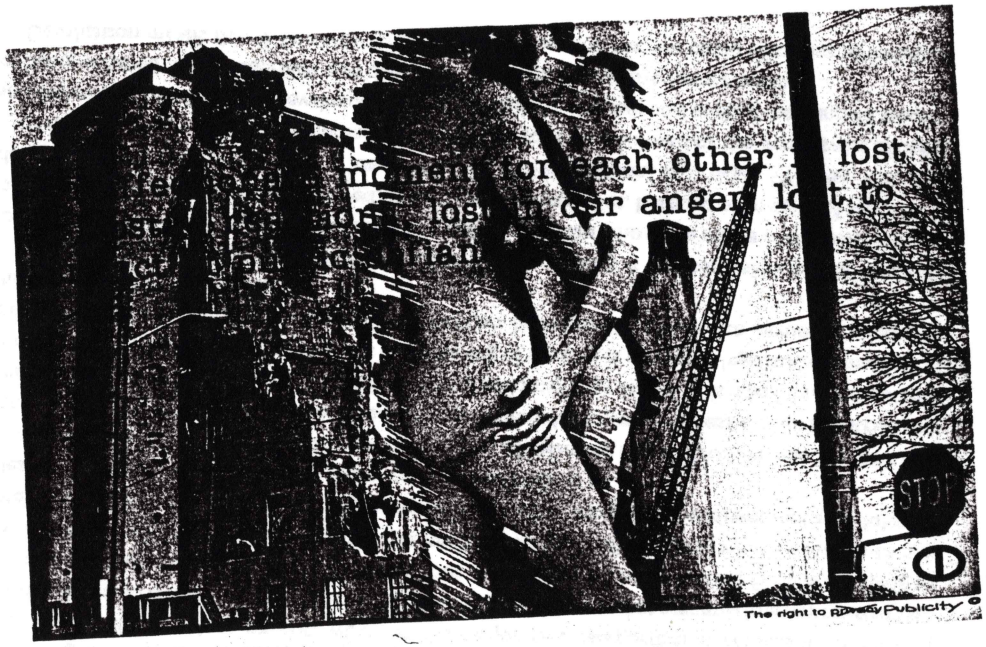
IF PORNOGRAPHY IS THE THEORY, IS INEQUALITY THE PRACTICE?

Yes, according to the Supreme Court of Canada, the LEAF brief and the Fraser Commission.[2]

No, according to everyone else, the scholars, economists, political scientists, sociologists and anthropologists who study equality and inequality and who find this notion bizarre. They are joined by others in the arts community who are understandably alarmed by this new assault on their freedom as producers and consumers, their freedom to create and have access to works which courts and customs officials find offensive. Then, too, there are the Court watchers who wonder about the political direction of a Supreme Court that has become more powerful since the Charter but whose members are appointed without much professional screening.

In short, there is a large community interested and predictably divided. On the one hand there are law-and-order activists who support state-sponsored censorship in principle, and others who are not doctrinal conservatives but believe, more-or-less intuitively, that pornography is instrumental in maintaining gender inequality. On the other side are civil libertarians as well as artists and others in the creative community who require artistic freedom as a condition of being able to work. Somewhere in between are the social critics who question what connection, if any, exists between pornography and gender equality.

Equality, here, refers to both equality of opportunity and equality of condition. (We can take it as given that certain forms of inequality like "affirmative action" policies which give special preference to disadvantaged groups are essential in creating equality.[3]) Our literature on inequality goes back several centuries, but current discussions usually start with Marx and his contemporaries in the nineteenth century. Within that tradition, the research and theorizing have been mainly about class inequality – its origin, development and the ideologies used to justify it. Studies of race and gender inequality are



more recent, but have followed the same paradigms. Particular attention is given to the economy and its impact on the size and structure of the labour force.

The cumulative literature on equality and inequality is easily accessible and warrants an examination by Supreme Court Justices before they dogmatically claim that pornography is part of a system of inequality. Further, the Court (or someone) owes us an explanation of why it is *cause* not *effect*.

The Butler decision on pornography examined the relationship between section 2(b) of the Charter of Rights and Freedoms and section 163(8) of the Criminal Code that proscribes obscenity. The broad legal question asked was whether the censorship of pornography could or could not be regarded as acceptable under The Charter which guarantees freedom of expression when the work in question met the criteria for obscenity under the Criminal Code. Would the Court now pave the way toward removing obscenity from the Criminal Code as an earlier Federal Law Reform Commission had recommended? Or would it close the door on that option?

Implicit in this and in the Fraser report is an assumption that runs throughout liberal political theory that there must be a balance, a trade-off between freedom of expression and security or freedom of expression and equality. The dichotomy between these goals means they may come into conflict. It assumes that no society can afford both freedom of expression and ideas, texts, discursive expressions that could endanger the state. It cites with approval an earlier report:

> A society which holds that egalitarianism, non-violence, consensualism and mutuality are basic to any human interaction, whether sexual or other is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles (p. 43).

Political censorship has always been rationalized on the basis of public safety, and there have always been more than enough moral entrepreneurs around to warn us of a crisis which calls for immediate and drastic action. The current assumptions are the same: (1) all societies are based on some kind of functional equilibrium which can sustain only incremental change; (2) Social movements which are perceived as endangering the social order must be curbed even if the grievances expressed by their participants have some merit; and (3) When large-scale protest and dissent occur as evidence of serious social dislocation, the entire system with all its interdependencies can become dangerously stressed. In the extreme, military intervention may be required to restore stability.

The purpose of insurgent social movements is to change the status quo, not restore it. From a feminist perspective it is particularly important to keep the unity of the structural and the ideational since equality and freedom of expression are not separable; they are two sides of the same coin. Splitting them and asking us to choose between structural equality and cultural liberation, between Section 163(8) of the Criminal Code or Section 15 of the Charter and Section 2(b) of the Charter, is like asking us to rank economic democracy and political democracy when, in reality, they are contingent upon each other.

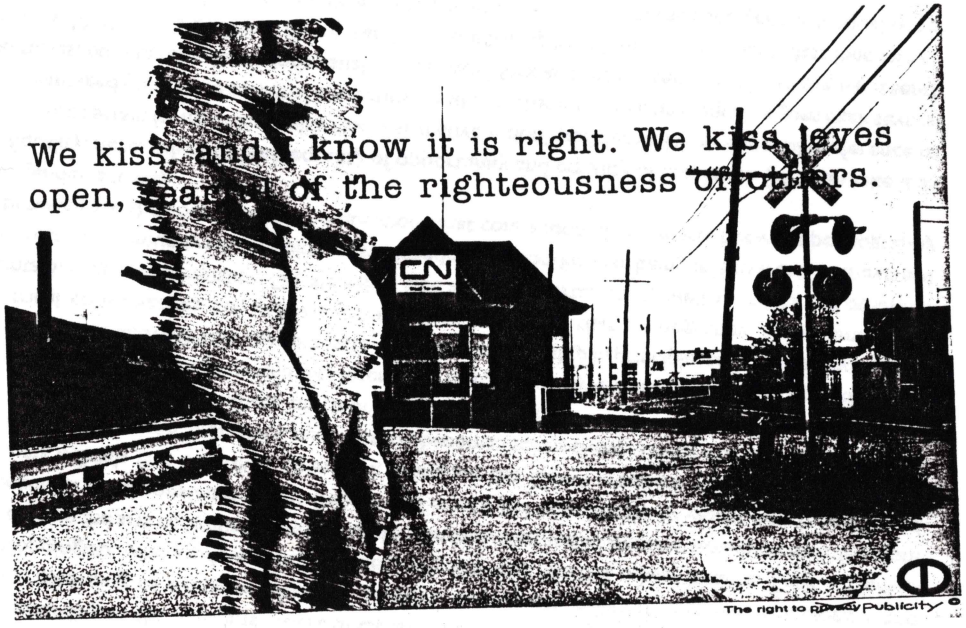
The radical message of feminism is the recognition that equality is not just a measure of equalization or fairness, but a transformative concept and part of a larger struggle for social change. Women, then, seek formal, legislative, Constitutional equality both for its own sake and as a challenge to a larger system of patriarchy. Equality is understood as a necessary but not sufficient condition for liberation. Equal pay for work of equal value is no more or less important than the right of women to explore the range and depths of human experience, the diverse models of human relations as well as the psychological limits and beyond of acceptable behaviour. If we are ever to find our own identity and give equality a social meaning, there is a process of cognitive reflection and emotional insight; we must be free to think about saints and sinners, Nobel Prize winners and failures, sanity and insanity, slavery and freedom, deviants and conformists, sadists and martyrs, Mother Teresa and Madonna.

State censorship denies us that experience and distorts it by creating a cultural demi-monde which, according to labelling theorists, may increase the incidence of recidivism and put women at greater risk. But whether it does or not, whether the perjorative categorization creates a self-fulfilling prophecy or not, censorship overprotects women and circumvents that essential journey toward self-discovery and the recovery or repatriation of our own minds and imaginations. Far from helping us to achieve equality or reduce inequality, the invidious labelling of consumers is an obstacle to any intelligent, objective analysis of sexually oriented materials or images that combine sex and violence, pleasure and pain. The prohibition of pornography infantilizes us.

It is essential that we challenge the liberal doctrine of balancing rights. Women who accept it find their needs being played off against each other: you can have freedom of expression, but not structural equality; or you can have structural equality and no freedom of expression. This is an Orwellian pseudo choice. We can resist it by affirming that the meaning of equality is not some legalistic or mechanical measure of equal opportunity or equality of condition, but a quality of life which includes freedom to think for and about ourselves.

The fallacy in the analysis of the Butler-LEAF-Fraser position is the confusion of the concepts 'degradation' and 'devaluation'. The ideal family-centred woman who is the staple of our mass culture is not *degraded*. She is *idealized*, revered, placed on a pedestal. But, because or in spite of this, she is devalued. The difference between 'degradation' and 'devaluation' is crucial. Women who are underpaid, in dead-end and environmentally hazardous jobs are confused by the ironic twist of being simultaneously idealized and devalued, of being praised for altruism and tricked into unpaid labour, of being admired for self-sacrifice and displaced economically for the same reason.

Devaluation means that if, by some strange set of circumstances, we could eliminate all forms of



pornography, hardcore and soft, sadomasochistic and child pornography, magazines, videos, films, the lyrics of popular music, women would still be earning sixty-six cents on the dollar, would still be under-represented politically, and would still be culturally marginalized. The prohibition of obscenity under Section 163(8) of the Criminal Code satisfies an urge to get even, but accomplishes nothing in the struggle for equality because it confuses symbolic degradation with instrumental devaluation.

BUTLER'S MAJOR THEMES

Within the general framework that dichotomizes freedom and equality, the major themes in the Butler decision are:

1) Pornography is both a moral problem and a social one:

> In order to warrant an override of Charter rights the moral claims must be grounded; they must involve concrete problems such as life, harm and well-being, and not merely differences of opinion or taste (p. 8).

The issue of pornography, then, is morality. But morality must be grounded in some concept of harm. The Court does not start, as you or I might, with the concept of harm and raise the question of whether certain kinds of specific and demonstrable harms constitute a public policy problem, a legislative problem or an ethical one. It puts the cart before the horse and is, in effect, saying that if there is no evidence of harm, there ought to be.

The moral note is found elsewhere in the decision; indeed, it takes the legislation back to the Hicklin rule which was based on protecting women and children and where the test of obscenity was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."[4]

2) The harm pornography does need not be demonstrated; it is self-evident.

> It might be suggested that proof of actual harm should be required. It is apparent from what I have said above that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm (p. 57).

While it does not go as far as the Meese Commission which rejects the necessity of offering any evidence, it comes close.[5] Yet, until recently the conventional wisdom was that pornography was a victimless crime. And that view was as self-evident and reasonable as the one the Court now holds. Without some proof, then, one hypothesis is as valid as the other. In other words, you cannot resolve differences between two equally plausible, equally reasonable ideas without some evidence. The Court simply ruled one of the ideas out by fiat and said the other one could be accepted on faith.

3) Pornography, it alleges, impacts primarily on women; indirectly, on the community. The nature of the harm is not specified but refers mainly to the impact of pornography on attitudes and beliefs, to a lesser extent on anti-social behaviour.

> Harm in this context means that it predisposes persons to act in an anti-social manner, as, for example, the physical or mental mistreatment of women by men.... Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning (pp. 31-32).

4) The intervening factor in the causal sequence is the portrayal of women that is "dehumanizing and degrading."

> Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings . . .the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes (p. 25).

Implicit in this language is an attack on modernism. If you want to find examples of dehumanization look at medical texts where personhood shrivels as people are classified in parts rather than the whole. What is more degrading and dehumanizing than finding your own unique self flattened in a statistical table? There are many things wrong in our social science tradition, but a return to a normative, non-rational, particularistic approach for comprehending large-scale and complex problems will not generate any positive or proactive social policy. There are no micro solutions to macro problems.

As for the notion that consent is not genuine and does not cancel or affect the potential harm, the Court imposes its own tortured logic. "Sometimes," it says, "the very appearance of consent makes the depicted acts even more degrading or dehumanizing." Most pornography does emphasize consent – indeed, this adds to its titillation – but it has put the critics of pornography in a difficult position of saying that bondage narratives like *The Story of "O"* must be based on false consciousness, on women being deceived or brain-washed or physically coerced into accepting their own subordination. This is just what women have complained about, that they are not given credit for

knowing their own interests or what they are doing. It is strange contradiction: the Court disbelieves women when they give their consent in a fictional context and disbelieves them when they say they did not give their consent in a rape case.

5) Books, films, videos, records that are found to have some intellectual or artistic merit can be exempt.

6) The community standards test is based not on my own reaction but what my neighbour thinks I would tolerate. "The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such an exposure." (p.31)There is a very subtle blending here of "is" and "ought," besides inviting me to restrict the freedom of others.The Court rejected the LEAF notion that the community standards test is "gender biased." Nor did it question the class bias in the exemption clause. Works which have artistic and/or intellectual merit are likely to be accessible to people who are highly educated, not to the semi-literate persons who have their own lowbrow and folk culture that are objects of critical derision among academics and other elites. To reiterate, the Butler decision as a whole takes us back in time, while it sets the conceptual course for future decisions.

IT'S SAFE TO SAY

Knowledgeable people know that censorship is costly to enforce and inefficient. It contributes, unintentionally, to an underground economy and leads to widespread noncompliance by dealers and distributors, thus, necessitating an escalation of surveillance and repressive measures. But, above all, it fails as a deterrent. What it achieves is short-run and largely symbolic. Censorship is the fastest and cheapest way of seeming to deal with the psychological uncertainty we feel about our social lives, our pervasive sense of being manipulated. Our current taboo is homosexuality, and I don't think it is an accident that the fallout of the Butler decision was an attempt to suppress gay and lesbian works.[6]

The state censorship advocated by LEAF and by the Court is based on a myth about the power of the media and the nature of social causation. No matter how often the myth is discredited, it lives on. In its present incarnation, it puts a feminist gloss on what is fundamentally anti-feminist; that is, a form of oppression by the patriarchal state. Women have nothing to gain from it and much to lose in terms of their wider struggle for liberation. Ultimately, it disempowers us or makes it that much more difficult to achieve the level of awareness, security and self-esteem that ensure a truly authentic empowerment.

I have seen a good cross-section of the pro-censorship movement, and I am always surprised at the coalition among feminists and women whose ideology is, at best, a maternal feminism circa 1900. Who is co-opting whom? I was not surprised when the Butler decision came down that the first to applaud it was the police followed by some of the self-appointed spokespersons in the women's movement. "Police, women applaud ruling. Supreme Court's obscenity decision called 'good' for Canadian society," according to the *Globe and Mail.* It quotes at length the views of Linda Taylor, President of the Alberta chapter of the Women's Legal Education Action Fund. "Video stores, police applaud porn law ruling," according to the *Toronto Star.* All and all, these are strange bedfellows.

I want to conclude by suggesting that the Supreme Court of Canada is not interested in gender equality or freedom, social justice or liberty. The Butler decision indicates the Court's concern is with protecting the Criminal Code, in "saving us from ourselves" and from a decadent permissive society. The harms it attributes to pornography are so vague that almost anything might qualify, but bear in mind that "harms" was an afterthought, a way of spelling out the meaning of morality, a slight

concession to utilitarian ethics. The Court borrowed the idea of making equality the central theme from the Fraser Commission and was pleased that a respected voice in the women's community would support it. But there is very little internal evidence to suggest that the Court has given serious thought to what feminists and most social critics mean by equality.

No one has ever said that freedom of expression is unconditional; no one believes we should be free to shout "fire" in a crowded theatre, but we have seen enough modern history to know that it is better for democracy to err on the side of too much freedom than too little. As for LEAF, I hope its members acquire a better understanding of inequality than the uninformed claim that pornography is in any way a factor in it. LEAF's view is an insult to social scientists and the broader intellectual community for whom structural equality is the crux of social justice and have laboured to develop the knowledge that would clarify and deepen our understanding of it. I am sure that in the near future LEAF will regret its brief, if it has not done so already.

NOTES

1. *New York Times*. 28 February 1992.

2. Butler v. the Queen (1992), 89 D.L.R. (4th) 449; Factum of the Intervener Women'sLegal Education and Action Fund. Kathleen E. Mahoney; and Report of the Special Committee on Pornography and Prostitution (1985) *Pornography and Prostitution in Canada.*

3. Abella, Judge Rosalie Silberman, Equality in Employment. A Royal Commission Report. (1984). Ottawa: Minister of Supplies and Services.

4. Regina v. Hicklin (1869) L.R.3 Q.B. 360

5. "Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm. And when we think about harm in this way, there are acts that must be condemned not because the evils of the world will thereby be eliminated, but because conscience demands it." United States, *Attorney General's Commission on Pornography* vol. 1 (Washington, D.C.: Department of Justice, 1986), p. 303.

6. *Glad Day Bookshop Inc. and Jearald Moldenhauer* v. *Deputy Minister of National Revenue for Customs and Excise*. July 14, 1992, Ontario Court of Justice.

This text is an abbreviated form of a talk presented at the recent forum Refusing Censorship: Feminists and activists fight back, *held in Toronto, November 7–8, 1992.*